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IN THE

Supreme Court of the United States

October Term, 1959

NO. 1021
(Miscellaneous Docket)

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

Statement of the Nature of the Case and Result Below

Petitioner, alleging total and permanent disability resulting from an accidental injury sustained while employed by the American Bridge Division of United States Steel Corporation in Orange County, Texas, filed his claim before the Texas Industrial Accident Board claiming that respondent, the insurer for his employer, owed him $14,035.

The Board entered an award of $1,050, and Respondent duly filed suit in the United States District Court, Eastern

District of Texas, seeking to be relieved of the claimed liability of $14,035 asserted by Horton.

Jurisdiction was based upon the diversity statute (28 U.S.C., § 1332).

After suit was brought, Horton moved to dismiss, and also filed a counterclaim for $14,035 alleging total permanent disability. The counterclaim was filed "subject to" the motion to dismiss.

One week after this suit was filed, Horton also brought suit in the District Court of Orange County, Texas, against respondent for $14,035, alleging total permanent disability from the same injury.

The U. S. District Court dismissed the action on the ground that less than $10,000 was involved between the parties, and the U. S. Court of Appeals for the Fifth Circuit reversed the District Court and ordered the cause reinstated. 275 F. 2d 148.

RESPONDENT'S COUNTERPOINTS

First Counterpoint

The Court of Appeals was correct in holding that claimed liability asserted by Horton before the Industrial Accident Board fixed the amount in controversy between the parties at $14,035.

Second Counterpoint

The Court of Appeals was correct in holding that Horton invoked the jurisdiction of the U. S. District Court by filing a counterclaim seeking recovery of $14,035 in this very suit.

First Counterpoint Restated

The Court of Appeals was correct in holding that claimed liability asserted by Horton before the Industrial Accident Board fixed the amount in controversy between the parties at $14,035.

Argument and Authorities

There is no Federal law allowing Horton any recovery for the injury he claims he sustained in the accident in question. Those rights are afforded him by state law, Article 8306, et seq., *Revised Civil Statutes of Texas.* Pursuant to the state law he made his claim that respondent owed him $14,035 in workmen's compensation. Having asserted this claim before the appropriate board, that claim fixes forever the money value of the right he seeks to enforce, and the money value of liability from which respondent seeks relief.

The Supreme Court of Texas, in *Booth v. Texas Employers Ins. Assn.*, 123 S.W. 2d 322 (Tex. Comm. App., opinion adopted by the Court, 1938), interpreting the Workmen's Compensation Act of Texas, has held:

> ". . .*The suit to set aside an award of the board is in fact a suit, not an appeal.* It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board. Section 5, as amended, of Article 8307, prohibits the board from proceeding further toward the adjudication of the claim after the filing of the suit. *The trial in court is de novo, wholly without reference to what may have been decided by the board.* It is true that as conditions precedent to the filing of suit the insurer or the employer must have been notified of the injury, claim must have been filed with the board, and the board must have made a final ruling and decision (Sec-

tion 4a, Article 8307), *but these requirements do not negative the fact that a suit is filed and tried, not merely an appeal taken.*" (Emphasis added.)

But by his own voluntary act, the employee fixes the money value of the right he seeks to enforce. In the *Booth v. Texas Employers*, supra, the court further holds:

> "When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can definitely be determined and the award of the board is less in amount than that of the claim, *the amount shown by the claim is the amount in controversy* and the suit should be filed in the court having jurisdiction of that amount." (Emphasis added.)

This, then, is the money value of the matter in controversy between the parties. Horton made his claim for $14,035, and respondent seeks to relieve itself from such claimed liability. Horton's right to recover that sum, and respondent's effort to resist is the thing in controversy, the subject matter of the suit.

Petitioner seeks certiorari on the ground that Horton *might* not recover that much on a trial. This is true, but does not oust jurisdiction. It sometimes happens that an insurance carrier wins a lawsuit, but that does not mean that the amount of money damages sued for was not the true amount in controversy.

Here, respondent has had asserted against it a claim (made in good faith) by Horton that he is entitled to $14,035. By bringing suit, it seeks to resist that total claim, and thus relieve itself of such claimed liability. Horton set the money value by filing his claim for $14,035, respondent did not.

Petitioner argues that since Congress now forbids *removal* of these cases, that it obviously meant to prevent direct actions also. These direct suits have been the subject of Federal jurisdiction for many years, and *if* Congress desired or intended to prevent direct filing of workmen's compensation suits in the Federal Court, it could and should have inserted in 28 U.S.C., § 1445 ". . . removed to *or filed in* any district court . . ." It did not see fit to do so. The courts should not now add "or filed in" for the Congress.

Petitioner relies on the decision in *National Surety Co. v. Chamberlain,* 171 F. Supp. 591 (N. Dist. Texas 1959), in support of his contention. The *Chamberlain* case was dealt with by the Court of Appeals in a much more forceful manner than can we. But, we would point out to the court that in *Chamberlain* the employee had brought his suit first in a Texas district court, and in the Federal Court the employee did not affirmatively seek relief by way of cross action.

This court held in *Smith v. Adams,* 130 U.S. 167, 9 S. Ct. 566 (1889), 9 S. Ct. at 569:

> ". . . By a matter in dispute is meant the subject of litigation,—the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, *or by the pecuniary result to one of the parties immediately from judgment.*" (Emphasis added.)

That the money value of the right herein asserted by Horton is $14,035 should be apparent by his assertions before the Industrial Accident Board, his counterclaim in this very suit, and his subsequent suit in Orange County, Texas, (R. p. 17), for that same amount. For the District Court to dismiss for want of jurisdiction, it must appear as a legal certainty that *less* than $10,000 is involved between the parties.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586 (1938), holds, 58 S. Ct. at 289:

> *"It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."* (Emphasis added.)

Further, at p. 294, although discussing removal, it is stated:

> "The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. *If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount*, and though he would be justly entitled to more, the defendant cannot remove." (Emphasis added.)

The same rationale applies here; if Horton truly did not desire to place the sum of $14,035 in controversy between himself and respondent, he could have *claimed* less before the Board.

Aetna Casualty & Surety Company v. Flowers, 330 U.S. 464; 67 S. Ct. 798 (1947), arising under the Tennessee Workmen's Compensation law, presented the question of

jurisdictional amount. There, a Tennessee court had awarded compensation in installments, the total of which were above the jurisdictional minimum but the amount of those due at the time of suit was less. On removal by the insurer, the employee-claimant resisted on the grounds that the amount in controversy was the amount of payments then due since that was the only pecuniary certainty between the parties, and any future payments were uncertain and conjectural. The court rejected this view, stating, 330 U.S. 464, at 467-8:

> "If this case were one where judgment could be entered only for the installments due at the commencement of the suit . . . future installments could not be considered in determining whether the jurisdictional amount was involved, even though the judgment would be determinative of liability for future installments as they accrued . . . But this is not that type of case. For the Tennessee *statute which creates liability for the award contemplates a single action for the determination of claimant's right to benefits and a single judgment for the award granted . . . Nor does the fact that it cannot be known as a matter of absolute certainty that the amount which may ultimately be paid, if respondent prevails, will exceed $3,000, mean that the jurisdictional amount is lacking. This Court has rejected such a restrictive interpretation of the statute creating diversity jurisdiction.*" (Emphasis added.)

The similarity of the *Flowers* case to the case at bar is striking. In both, it is the claimed liability of the insurer as asserted by the employee that fixes the money value of the right sought to be enforced.

Very closely related to this case are the cases where suit is brought by an insurer seeking to avoid some claimed liability upon an insurance policy. In *Hartford Accident & Indemnity Co. v. Northwest National Bank*, 228 F. 2d 391 (7th Cir. 1955), the insurer sought to cancel the policy although only $405.00 was then claimed. In passing on the jurisdictional amount, the court states, 228 F. 2d 391, 402:

> "There remains to be considered the contention of the Bank that the suit as to it should have been dismissed for lack of jurisdiction on the ground that the requisite amount was not involved. This contention is based upon the Bank's theory that there was nothing in dispute between plaintiffs and it other than the sum of $405.00, which the Bank had received from the plaintiff Hartford Fire Insurance Company in payment of damages to the car . . . which by the judgment under attack the Bank was required to pay to the insurer. We think this is a misconception of the situation . . . The amount in controversy was *the value of the policy in suit, or,* perhaps more accurately stated, *the amount of the liability which plaintiffs were called upon to assume,* and not merely the amount in dispute between the plaintiffs and the Bank." (Emphasis added.)

A similar holding is found in the case of *Aetna Casualty & Surety Co. v. Yeatts*, 99 F. 2d 665 (4th Cir. 1938).

In *General Accident Fire & Life Assurance Corporation v. Mostert*, 131 F. 2d, 596 (5th Cir. 1942), it was stated:

> "It is conceded that under the Texas Compensation Law, Vernon's Annotated Civil Statutes of Texas, Art. 8306, a suit to set aside an award opens up for trial

de novo the claim filed with the Board; and we assume, as the parties do, that the amount here in controversy *is the largest amount that could be recovered under the claim.*" (Emphasis added.)

Petitioner quotes statistics from Senate Report No. 1830, 85th Congress, Second Session, 7, 8 (1958), showing that there were 2147 workmen's compensation cases filed in Texas in 1957. Petitioner state 1146 removed cases, and then *assumes* the remainder were all filed as direct actions by the insurer. However, such report is silent as to how many were filed as direct actions by employees. Obviously, a great number are filed by employees, as is their right. Congress has not seen fit to stop workmen's compensation suits from being filed directly in Federal Courts, and as long as such jurisdiction exists, it should be honored.

Second Counterpoint Restated

The Court of Appeals was correct in holding that Horton invoked the jurisdiction of the U. S. District Court by filing a counterclaim seeking recovery of $14,035 in this very suit.

Argument and Authorities

Petitioner filed a counterclaim in this suit, saying it was "subject to" his motion to dismiss.

Rule 12, Federal Rules of Civil Procedure, allows certain *defenses* to be asserted "subject to" any other *defense*. It is submitted that the Rules do not permit affirmative counterclaims to be filed "subject to" a motion to dismiss.

The long established rule has been that where, as in this case, the jurisdictional amount is in question, and

a counterclaim is brought in an amount which *in itself*, or added to the amount claimed in the complaint, adds up in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be the state of the plaintiff's complaint. *Home Life Insurance Co. v. Sipp*, 11 F. 2d 474 (3rd Cir., 1926); *Roberts Min. and Mill Co. v. Schrader*, 95 F. 2d 522 (9th Cir., 1938). See also, *Isenberg v. Biddle*, 125 F. 2d 741 (D.C. Cir., 1941); *Switzer Brothers v. Chicago Cardboard Co.*, 252 F. 2d 407 (7th Cir., 1958).

Petitioner has cited no authority showing that a counterclaim of $14,035 can be asserted "subject to" a motion to dismiss for want of jurisdictional amount. Of course, petitioner was not required to counterclaim for $14,035; he could have sued for $9,900 if he desired.

Conclusion

The matter in controversy and the issue here litigated is the right of respondent to be free from the claimed liability asserted against it by petitioner Horton. By his own action he valued that right at more than $10,000 before the Industrial Accident Board, before the United States District Court by counterclaim and by a separate, distinct suit in the state court.

The right he seeks to enforce is given him by Texas, not Federal law. The Supreme Court of Texas, and the Court of Appeals many times have held the money value of that right and the money value of the claimed liability of the insurer is the amount sought by the employee before the

Industrial Accident Board. The decision below was correct, the petition for certiorari should be denied.

Respectfully submitted,

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By _____
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This is to certify that a true copy of the foregoing Reply to Petition for Writ of Certiorari has been served on Petitioner's counsel, Joe H. Tonahill, P. O. Box 179, Jasper, Texas, and William VanDercreek, 3315 Daniels, Dallas 5, Texas, by depositing the same in the United States Mail with first class postage prepaid properly addressed.

_____
MAJOR T. BELL